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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL JOSEPH MENDEZ,

Defendant and Appellant.

D074664

(Super. Ct. No. SCN367620)

APPEAL from a judgment of the Superior Court of San Diego County, Sim von Kalinowski, Judge. Reversed and remanded for resentencing, and otherwise affirmed.

Alex Coolman, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel, and Tami Falkenstein Hennick, Deputy Attorneys General, for Plaintiff and Respondent.

Michael Joseph Mendez pleaded guilty to armed robbery (Pen. Code, § 211)¹ and admitted that he suffered six prior strike convictions (§§ 667 subds. (b)-(i); 1170.12), that those same convictions were serious felonies (§ 667 subd. (a)), and that he had served two prior prison terms and failed to remain free of custody for five years following release (§ 667.5 subd. (b)). The trial court denied Mendez's *Romero*² motion to strike five of his prior strike convictions and sentenced him to 30 years in prison.

Mendez contends (1) the trial court abused its discretion by denying his *Romero* motion; (2) we should remand this matter based on newly enacted Senate Bill No. 1393 so that the trial court may decide whether to exercise its discretion to strike the five-year sentence enhancement imposed for Mendez's prior serious felony (§ 667, subd. (a)); and (3) under *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*) the trial court could not legally impose a \$9,000 restitution fine and \$70 in assessments without first determining his ability to pay.

We conclude that the trial court did not abuse its discretion in denying the *Romero* motion, but we will remand this matter so that the trial court may decide whether to exercise its discretion to strike the five-year enhancement for the prior serious felony. Because we are already remanding the case for resentencing in light of the amendment to section 677, we decline to address Mendez's claim of error under *Dueñas*. On remand, Mendez may raise his inability to pay argument during resentencing in the trial court.

¹ Undesignated statutory references are to the Penal Code.

² *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

I. FACTUAL BACKGROUND

In the early morning hours on December 17, 2016, Mendez approached the front counter of a convenience store wearing a black bandana over his face and told the victim to " 'open the register.' " When the victim asked why he should do this, Mendez unzipped his jacket, put his hand on the " 'handle of a gun' " tucked in his front waistband and said, " 'I'll shoot you.' " The victim saw two pistols, one with a black handle on Mendez's right side and a second pistol tucked in the waistband on Mendez's left side. The victim opened the register, pressed the panic alarm, removed \$36 and gave the money to Mendez. Before fleeing, Mendez moved the bandana down exposing his face.

Police detained Mendez in a nearby car. Inside the car, the police recovered a black bandana, a black cartridge belt, a wood-handled knife, a Spiderman mask, and a replica pistol. Mendez admitted the robbery, stating that he was high on methamphetamine and that he needed the money to purchase marijuana.

II. DISCUSSION

A. *The Trial Court Did Not Abuse Its Discretion by Denying Mendez's Romero Motion*

The trial court may exercise its discretion and dismiss a prior strike conviction if the dismissal is in furtherance of justice. (§ 1385, subd. (a); *People v. Williams* (1998) 17 Cal.4th 148, 158 (*Williams*); *Romero, supra*, 13 Cal.4th at pp. 529-530.) We review the trial court's ruling on a motion to strike prior convictions under the deferential abuse of discretion standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 374 (*Carmony*).) In ruling on a motion to strike a prior conviction under the three strikes law, a court must

ask " 'whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.' " (*Id.* at p. 377.) The defendant must show that the trial court's sentencing decision was "so irrational or arbitrary that no reasonable person could agree with it." (*Ibid.*) If the record demonstrates that the trial court reached an impartial decision in conformity with the spirit of the law after balancing the relevant facts, we will affirm the ruling " 'even if we might have ruled differently in the first instance.' " (*Carmony*, at p. 378.)

The three strikes law "not only establishes a sentencing norm, it carefully circumscribes the trial court's power to depart from this norm [T]he law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper." (*Carmony, supra*, 33 Cal.4th at p. 378.) "The court is presumed to have considered all of the relevant factors in the absence of an affirmative record to the contrary." (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.) A career criminal must show "extraordinary" circumstances to fall outside the spirit of the three strikes law and the failure to strike a prior strike conviction will not constitute an abuse of discretion unless no reasonable minds could differ. (*Carmony*, at p. 378.)

Mendez requested that the trial court strike five of his six prior strike convictions, which were armed robbery convictions during a week in 1997, just before Mendez turned

18 years old.³ Mendez argued that the strikes should be stricken because his criminal conduct has decreased in severity and punishment under the three strikes law would be disproportionate to the severity of the current offense.

The trial court prefaced its decision by reciting the standards for ruling on the motion articulated by our high court in *Carmony*, *supra*, 33 Cal.4th 367 and *Williams*, *supra*, 17 Cal.4th 148. The court concluded that the current offense was violent and serious because Mendez threatened to shoot the victim, and the victim suffered fear even though Mendez had a fake gun. The court concluded that Mendez has psychological issues, but found that these issues did not impair Mendez's ability to understand the nature and criminality of his actions. Although Mendez was also under the influence of methamphetamine, the court found that Mendez had three opportunities to deal with this issue through rehab.

Mendez committed all of his prior offenses with firearms or deadly weapons, and Mendez shot someone during one crime. Although the prior offenses were committed during a week-long crime spree, the court noted that the crimes involved multiple acts and victims. The court stated that Mendez's crimes were decreasing in number, but that their severity remained the same. Given Mendez's age (38), the trial court found little likelihood of change. The court acknowledged that Mendez's family relationships had been "either minimal or toxic," and that his life history had been "truly nightmarish." The

³ We grant Mendez's unopposed motion to augment the record with the reporter's transcript of the March 12, 1998 hearing in case SF121111 in which his prior strike convictions were originally adjudicated. (Cal. Rules of Court, rule 8.155(a)(1)(B).)

court stated that if successful in treatment, this fact "could lead to an earlier parole date by the parole board." Before denying the motion, the court stated:

"And I recognize that and I have sympathy for [Mendez's family history] and I think, as [defense counsel] indicated, most likely pushed you down this road to where you are today. [¶] But, unfortunately, it's hardwired in [Mendez] to turn to crime when he wants something. The Court is particularly struck here with how easily [Mendez] decided to threaten a store clerk with death just because he wanted a little bit of money to buy marijuana and an acquaintance suggested he rob the store. If [Mendez] is willing to employ a significant threat of violence under such minimal circumstances and knowing the consequences from what occurred within his life, the only way society can be protected is incarceration."

Mendez contends the trial court erred by relying on the inaccurate assertion that he could obtain an earlier parole date if he demonstrated success in substance abuse treatment and psychological counseling. He notes that, because he is an individual who was sentenced to a third strike 25-year-to-life term after committing a new violent felony, he must in fact serve the equivalent of 25 years in prison before parole eligibility.

Mendez is correct that for a third strike felony offense, such as the one imposed on him, "[t]he shortest minimum term required for the indeterminate life sentence is 25 years before parole eligibility." (*People v. Carmony* (2005) 127 Cal.App.4th 1066, 1087; §§ 667, subd. (e)(2)(A), 1170.12, subd. (c)(2)(A).) However, absent any contrary indication in the record, we are required to presume judges know and understand the law. (*People v. Galvez* (2011) 195 Cal.App.4th 1253, 1264.) "[A]n abuse of discretion occurs where the trial court . . . considered impermissible factors." (*Carmony, supra*, 33 Cal.4th at p. 378.)

Here, the court's statement that Mendez's success in drug treatment "could lead to an earlier parole date by the parole board" does not support a finding that this presumption has been rebutted. When the trial court made this statement it had read the probation officer's report which stated that the court's "only sentencing option . . . [was] 25 years to life" with an additional five years for the serious felony prior conviction. The trial court followed the probation officer's recommendation for a 30-year term (25 to life for the robbery and a consecutive five years for the prior serious felony). Accordingly, we presume the court understood that Mendez was subject to a minimum 25-year prison term if his *Romero* motion were denied. The court's statement that Mendez might be paroled before the end of his 30-year term if successful in treatment was not demonstrably wrong.

Mendez next contends that the trial court abused its discretion by refusing to dismiss five of his prior strike convictions, claiming the court did not give enough weight to the extraordinary circumstances that led to him to commit the crimes. He argues that the *Romero* analysis requires a consideration of "the particulars of [the defendant's] background, character, and prospects," not simply a generic reference to the fact that his background was difficult or toxic. (*Carmony, supra*, 33 Cal.4th at p. 377.) We are not persuaded by this argument because a trial court need not explain its reasons for declining to dismiss a prior strike. (*In re Large* (2007) 41 Cal.4th 538, 550.)

Here, the trial court examined all relevant filings before denying the motion. Mendez's criminal lifestyle started at age 12 when he took another juvenile's bicycle at knife point. Between 1993 and 1994, Mendez suffered true findings for attempted

robbery, carrying a knife on school grounds, attempted vehicle theft, theft, and possession of burglary tools. Before turning 18 years old he was charged with 11 counts of robbery, among other crimes. He pleaded guilty to six counts of robbery and admitted personally using a firearm during four of the robberies and personally using a knife during one of the robberies. He received a 13-year prison sentence. After his release from prison he violated parole five times. In 2012, he was convicted of misdemeanor possession of a switchblade and was sentenced to 140 days in county jail. In 2013, he was convicted of felony possession of a controlled substance and received a 32-month prison term. He committed the instant offense in December 2016.

The court expressly considered Mendez's life history before exercising its discretion. Moreover, the Legislature's policy decision to allow juvenile adjudications for qualifying crimes committed at the age of 16 and after to be used as prior strikes under the three strikes law shows that youth is not an excuse for recidivism. (See *People v. Smith* (2003) 110 Cal.App.4th 1072, 1078.) Mendez fell squarely within the ambit of the three strikes law, and the trial court's decision against striking his prior convictions for purposes of sentencing was well within its discretion.

B. *Remand Is Required to Allow the Trial Court to Decide Whether to Exercise Its Discretion to Strike the Five-Year Enhancement for Mendez's Prior Serious Felony Conviction*

The trial court imposed a five-year prison term enhancement under section 667, subdivision (a) based on Mendez's admission that he incurred a prior serious felony. At the time of sentencing, the court was required under section 667, subdivision (a), to enhance the sentence imposed for conviction of a serious felony by five years for each

qualifying prior serious felony conviction. On September 30, 2018, the Governor signed Sen. Bill No. 1393, which, effective January 1, 2019, amended section 1385, subdivision (b) to allow a court to exercise its discretion whether to strike or dismiss a prior serious felony conviction for sentencing purposes. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971 (*Garcia*).)

Mendez contends, the People concede, and we agree, that Sen. Bill No. 1393 applies retroactively to Mendez's judgment, which was not yet final as of January 1, 2019. (*Garcia, supra*, 28 Cal.App.5th at pp. 971-972.) Because we cannot conclusively determine from the record that remand would be a futile act, we remand for the trial court to consider whether to dismiss or strike the five-year section 667, subdivision (a) enhancement imposed on Mendez. (See *Garcia*, at p. 973, fn. 3 [Remanding for resentencing when "[t]he record does not indicate that the court would not have dismissed or stricken defendant's prior serious felony conviction for sentencing purposes, had the court had the discretion to do so at the time it originally sentenced defendant."].) We express no opinion about how the court should exercise this discretion.

C. *On Remand, and in Light of Dueñas, the Trial Court May Also
Consider Mendez's Ability to Pay Argument*

At sentencing, the court imposed a \$40 court operations assessment (§ 1465.8), a \$30 criminal conviction assessment (Gov. Code, § 70373), a \$9,000 restitution fine (§ 1202.4, subd. (b)), and a suspended \$9,000 parole revocation fine (§ 1202.45) without considering Mendez's ability to pay.

While this appeal was pending, the Court of Appeal issued an opinion in *Dueñas*, *supra*, 30 Cal.App.5th 1157, holding that a trial court violated a defendant's right to due process under both the United States and California Constitutions by imposing court operations and facilities assessments pursuant to Government Code section 70373 and section 1465.8 without making a determination as to the defendant's ability to pay. (*Dueñas*, at p. 1168.) The court also concluded that the imposition of restitution fines pursuant to section 1202.4, subdivision (b) raises similar constitutional concerns, and therefore held that, while the trial court must impose the minimum restitution fine even if the defendant demonstrates an inability to pay, it must stay execution of the fine in such cases until it determines the defendant has the ability to pay. (*Dueñas*, at p. 1172.)

Relying on *Dueñas*, Mendez asks us to remand the matter so that the trial court can consider evidence of his inability to pay the fine and assessments. The People contend Mendez bore the burden of proving an inability to pay and that Mendez forfeited any argument regarding his ability to pay the fine and assessments by failing to raise this issue in the trial court. We need not resolve these contentions. We are already remanding the matter for resentencing on another issue and, should he choose to do so, Mendez can raise an argument regarding his ability to pay the fine and assessments during resentencing.

DISPOSITION

The judgment is reversed for the purpose of remanding to the trial court with directions that it (1) decide whether to exercise its discretion to strike the five-year enhancement for Mendez's prior serious felony conviction; and (2) permit Mendez to

litigate his ability to pay the fine and assessments. If the trial court decides to strike the enhancement or vacate the fine and assessments, it shall resentence Mendez. If the trial court does not strike the enhancement or vacate the fine and assessments, it shall reinstate the sentence. In all other respects, the judgment is affirmed.

IRION, J.

WE CONCUR:

McCONNELL, P. J.

AARON, J.